Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	
Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), by its attorneys, hereby submits its comments with respect to the FCC's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1/]

I. INTRODUCTION.

U S WEST currently offers competitive multichannel video service via franchised "overbuild" cable systems in and around the Phoenix metropolitan area and in parts of the City of Omaha, and Douglas and Sarpy Counties, Nebraska. At the present time, U S WEST's cable systems serve approximately 16,000 subscribers in Arizona and 20,000 subscribers in Nebraska, offering a full menu of broadcast, cable and pay-per-view programming services. Finally, U S WEST has just recently been awarded a cable franchise to serve the residents of Douglas County, Colorado. All told, U S WEST is constructing cable systems in areas that will have 800,000 homes passed. Since the ability to offer broadcast programming represents an indispensable component of U S WEST's cable overbuilds, the Commission's resolution of the retransmission

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[1/] FCC 99-406 (rel. Dec. 22, 1999).

consent issues raised in the *NPRM* will have a direct and substantial impact on U S WEST's viability as a competitive provider of multichannel video programming in the aforementioned areas.

Section 1009 of the Satellite Home Viewer Improvement Act of 1999 (the "SHVIA") requires the Commission to adopt rules that, until January 1, 2006, prohibit local television stations from (1) refusing to negotiate their retransmission consent agreements in "good faith" or (2) entering into exclusive retransmission consent agreements with any multichannel video programming distributor ("MVPD"). The purpose of these provisions is to ensure that incumbent cable operators do not use their market power to extract discriminatory or exclusive retransmission consent agreements that deny U S WEST and other competitors equitable access to broadcast programming that is critical to their survival. Equally significant, Section 1009 gives the Commission wide discretion to define "good faith" in a manner consistent with the overriding pro-competitive objectives of the statute.

Accordingly, U S WEST believes that the Commission can and should give full effect to Congressional intent by including clear and specific nondiscrimination criteria into its definition of "good faith," such that local television stations, incumbent cable operators, alternative MVPDs and their customers are put on notice as to what types of anticompetitive conduct will not be tolerated during the retransmission consent process. Furthermore, given the irreparable anticompetitive effects of exclusive retransmission consent agreements, U S WEST believes that the Commission should not automatically sunset its ban on such agreements as of January 1, 2006 absent a more explicit mandate from Congress to do so. Finally, it is absolutely essential that the Commission facilitate "swift and effective" enforcement of Section 1009 by designing a streamlined, expedited

complaint process for alternative MVPDs that is comparable to that accorded to local broadcasters who allege violations of the Commission's signal carriage rules.

II. ARGUMENT.

A. The FCC's Implementation Of The "Good Faith" And Exclusivity Provisions Of Section 1009 Must Be Consistent With The Fundamental Objectives Of Retransmission Consent.

Above all else, it must be remembered that Congress did *not* adopt the retransmission consent provisions of the 1992 Cable Act to give incumbent cable operators yet another weapon with which to undermine full and fair competition from cable overbuilders and other alternative MVPDs. Rather, Congress adopted the retransmission consent law in recognition of the fact that cable networks and local broadcasters compete against each other for advertising dollars, but that cable networks effectively were being subsidized with cable system revenues attributable to carriage of local broadcast signals.[2/] Congress thus attempted to level the playing field by giving local broadcasters the right to insist on compensation as a *quid pro quo* for cable carriage of their programming, and to deny cable systems the right to carry that programming where an agreement as to compensation has not been reached.

Obviously, the competitive imbalance which motivated Congress to adopt the retransmission consent law does not exist as between cable overbuilders and local broadcasters. Whereas the

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[2/] *See* S. Rep. 102-92, at 35 (1991) ("Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.").

market power of the cable MSOs persists to this day,[3/] and in fact has increased to the extent that consolidation among the cable MSOs forces a local broadcaster to deal frequently with a single cable operator who controls the lion's share of a market's subscribers, U S WEST's cable overbuild systems control only a relatively small number subscribers in local markets and thus do not have market power *vis-a-vis* local television stations or any other provider of video programming. As a result, U S WEST has far less leverage than incumbent cable operators when negotiating retransmission consent agreements with local television stations, and the Commission's implementation of the "good faith" and exclusivity provisions of Section 1009 must reflect this basic economic fact.[4/]

Accordingly, U S WEST urges the Commission to protect alternative MVPDs and their customers by incorporating strong anti-discrimination criteria into its definition of "good faith" for purposes of retransmission consent. While it is true that Section 1009 permits local television stations to offer retransmission consent under different terms and conditions to different MVPDs,

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[3/] *See, e.g., Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, FCC 99-379, at ¶ 30 (rel. December 13, 1999) ("[W]hile there has been increased entry into the MVPD services market, the incumbents continue to hold dominant positions.") (the "*LMDS Sixth NPRM*").

[4/] As demonstrated quite clearly during the recent retransmission consent dispute between Fox Broadcasting and Cox Communications, broadcasters with sufficient bargaining power are more than willing to withhold their programming from incumbent cable operators who do not accede to their demands for compensation. *See, e.g.,* "Prospects Dim For Cox-Fox Retransmission Consent Agreement," *Communications Daily*, at 4 (January 4, 2000). It therefore stands to reason that those same broadcasters would have even fewer reservations about using such tactics against cable overbuilders who have little or no negotiating leverage whatsoever and, absent aggressive implementation of Section 1009, have no remedy at the Commission.

such differences must be based on "competitive market considerations," a term which clearly implies that local television stations may not discriminate against cable's competitors during the retransmission consent process.[5/] U S WEST thus recommends that the Commission define "good faith" in accordance with the program access anti-discrimination criteria set forth in Section 628(c)(2)(B) of the 1992 Cable Act.[6/] Though the Section 628 criteria include a number of loopholes that have proven to be problematic for cable's competitors (particularly as to price discrimination), they may represent the most practical alternative given the short time frame within the Commission must complete this proceeding.[7/]

By the same token, however, the Commission should recognize that the Section 628 nondiscrimination criteria are *minimum* guidelines,[8/] and that Congress accorded the Commission broad discretion to go beyond the Section 628 criteria when defining what constitutes unlawful discrimination under Section 1009. More specifically, the FCC can and should declare that any

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[5/] *See* Remarks of Rep.W.J."Billy" Tauzin, 145 Cong. Rec. H2320 (daily ed. April 27, 1999) ("[T]he FCC is directed to bar not only exclusive deals but also any other discriminatory practices, understandings, arrangements and activities by the station which have the same effect of preventing any particular distributor from the opportunity to obtain a retransmission consent agreement).

[6/] 47 U.S.C. § 548(c)(2)(B).

[7/] Of particular concern to U S WEST is the fact that Section 628(c)(2)(B)(iii) permits a cable programmer to charge cable overbuilders different rates based on "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the [overbuilder]." A number of programmers have interpreted this language as affording them unlimited license to offer steep volume discounts exclusively to the cable MSOs, even where those discounts bear no reasonable relationship to any cost savings or other economic benefits permitted under the statute.

[8/] *See* 47 U.S.C. § 548(c)(2) (titled "Minimum Contents of Regulations").

attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent will be deemed a per se violation of the "good faith" requirement and shall be actionable as such. The legislative history of the 1999 Act reflects that Congress was aware of the discriminatory impact of non-optional tying arrangements, and expected to regulate such arrangements to minimize anticompetitive harm to competing MVPDs and their customers.[9/] Moreover, there is no legitimate public interest justification for permitting Fox and the other television networks to force cable overbuilders and their customers to subsidize their investments in cable programming services, particularly since cable overbuilders generally do not serve enough subscribers to have a material impact on the success or failure of a cable network.[10/]

Finally, as to the issue of exclusivity, Section 76.64(m) of the Commission's Rules prohibits a broadcaster from entering into an exclusive retransmission consent agreement with any MVPD.[11/] Section 325(b) of the Communications Act of 1934, as amended by Section 1009 of the 1999 Act, requires the Commission to adopt regulations that, until January 1, 2006, "prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts . . . ."[12/]

[9/] *See* Statement of Senator Herbert Kohl, 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) ("At the very most, a "competitive marketplace" would tolerate differences based upon legitimate cost justifications, but not anti-competitive practices such as illegal tying and bundling.").

[10/] For similar reasons, the Commission should declare that any retransmission consent agreement that ties an MVPD's right to carry a local television station to that MVPD's attainment of a minimum subscriber penetration level discriminates against competing MVPDs and in favor of incumbent cable operators, and thereby constitutes a per se violation of the "good faith" requirement. See *Outdoor Life and Speedvision Networks*, 13 FCC Rcd 12226, 12235 (CSB, 1998) ("We find, . . ., that a 'sufficiently high subscriber penetration requirement' is a criterion that discriminates against alternative MVPDs and in favor of incumbent cable operators.").

[11/] 47 C.F.R. § 76.64(m).

[12/] 47 U.S.C. § 325(b)(3)(C).

While acknowledging that the legislative history of the 1999 Act "contains no language to clarify or explain the prohibition [on exclusivity],"[13] the Commission states that Section 1009 "would seem to sunset any prohibition on exclusive retransmission consent contracts" as of January 1, 2006. [14]

Aside from the fact that Congress did not repeal Section 76.64(m) or otherwise express any intent in the SHVIA to divest the Commission of its jurisdiction over exclusive retransmission consent *permanently*, the Commission's reading of Congress's reference to "January 1, 2006" in Section 1009 runs afoul of the principle that federal statutes must be "examined as a whole, giving due weight to design, structure, and purpose . . . to aggregate language."[15] U S WEST generally supports sunset provisions to encourage the elimination of regulation that becomes unnecessary over time. By the same token, however, U S WEST believes that where Congress has given the Commission discretion to extend or sunset its regulatory authority, the Commission's decision to sunset should be made at a time closer to the purported sunset date, in order to account for changed marketplace conditions. Moreover, it is clear from the legislative history of the 1999 Act that Congress intended to promote competition to cable and expand consumer choice in the MVPD marketplace.[16] By contrast, the Commission's proposed abandonment of its ban on exclusive

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[13] *NPRM* at ¶ 21.

[14] *Id.* at ¶ 24.

[15] *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996). *See also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("The cardinal rule [is] that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (citation omitted).

[16] *See, e.g.,* Remarks of Rep. Thomas J. Bliley, 145 Cong. Rec. H2319 (daily ed. April 27, 1999) ("[T]his is a significant bill because it will promote genuine competition in the video programming marketplace. For too long now consumers have sought competitive choices to their incumbent cable operators. . . This bill will facilitate satellite-delivered local broadcast programming and, as such, shift satellite television into higher gear in its quest to compete with cable.").

retransmission consent agreements would eventually permit incumbent cable operators to eviscerate competition by entering into exclusive retransmission consent agreements that deny their competitors full and fair access to broadcast programming. Given the procompetitive focus of the 1999 Act, and before it the Telecommunications Act of 1996 and the 1992 Cable Act, the Commission should not take the dramatic step of surrendering its jurisdiction over exclusive retransmission consent agreements at any time absent a more explicit mandate from Congress to do so.[17/]

B. The Commission's Retransmission Consent Complaint Procedures Must Minimize Any Anticompetitive Harm Caused By Illegal Retransmission Consent Agreements Between Broadcasters and Incumbent Cable Operators.

U S WEST supports the Commission's proposal to use its Section 76.7 special relief procedures when reviewing alleged violations of the exclusivity or good faith provisions of the 1999 Act.[18/] However, since U S WEST's customers will not tolerate any loss of broadcast programming for extended periods of time, those procedures must provide for expedited review and resolution of any complaint filed by a competing MVPD. In no event should the processing period for an exclusivity/good faith extend beyond 120 days after the complaint is filed.[19/] Moreover, to ensure that competing MVPDs and their customers suffer no unwarranted disruptions of service pending resolution of retransmission consent disputes, the Commission should prohibit a broadcaster from

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[17/] *Compare, e.g.*, 47 U.S.C. § 309(j)(13)(F) (Commission's authority to issue pioneer's preferences "shall expire on August 5, 1997").

[18/] *NPRM* at ¶ 26.

[19/] This is the resolution period afforded to must-carry complaints under Section 614(d)(3) of the 1992 Cable Act. *See* 47 U.S.C. § 543(d).

withdrawing any existing retransmission consent given to an MVPD unless and until the MVPD's exclusivity/good faith complaint is denied by the Cable Services Bureau and, if reconsideration is requested, the full Commission.[20/] Basic considerations of fairness dictate that aggrieved MVPDs be accorded the same benefit during the course of a retransmission consent dispute, so as to ensure that their customers do not suddenly lose access to local broadcast signals while the legality of a broadcaster's conduct during the retransmission consent process is under Commission review.

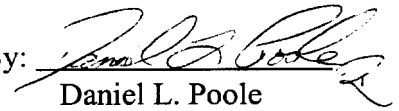
Finally, given the fundamental unfairness of requiring an aggrieved MVPD to present a *prima facie* case without having access to critical evidence in the exclusive possession of the defendant, the Commission's Rules should provide that an aggrieved MVPD shall be deemed to have established a *prima facie* case where the MVPD's complaint includes allegations of unlawful exclusivity or discrimination which, if proven to be true, would constitute a violation of the exclusivity/good faith provisions of the SHVIA. Where a complaining MVPD satisfies this requirement, the Commission should shift the burden of proof to the defendant broadcaster and require it to include with its answer a copy of any retransmission consent agreement(s) with any other MVPD(s) which the complainant alleges to include unlawfully different terms and conditions, subject to whatever confidentiality protection the Commission deems appropriate under the circumstances. This procedure will provide the complainant and the Commission with immediate access to the most critical evidence at issue, without burdening the Commission's staff with the task of implementing customized discovery procedures for each and every complaint before it.

[20/] Broadcasters already enjoy similar protection where a cable operator seeks to drop a broadcaster via the Commission's market modification process. *See Dynamic Cablevision of Florida, Ltd.*, 12 FCC Rcd 9952, 9960 (1997) (cable operator may not drop local broadcaster while market modification petition remains pending before the Cable Services Bureau or the full Commission).

III. CONCLUSION.

U S WEST has been and continues to be more than willing to negotiate retransmission consent agreements with local television stations on reasonable terms and conditions. All that U S WEST asks is that the Commission's rules preserve U S WEST's right to do so, taking into account the wide disparity in market power between incumbent cable operators and cable overbuilders. "Local into local" notwithstanding, there is little question that Congress's vision of a fully competitive MVPD marketplace will not be realized if the Commission's retransmission consent rules permit any other result.

Respectfully submitted,

By: 

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